

PATENAUE & FELIX, A.P.C.

Raymond A. Patenaue, Esq. (SBN 128855)

Matthew B. Golding, Esq. (SBN 171123)

4545 Murphy Canyon Road, 3rd Floor

San Diego, California 92123

(858) 244-7600 Fax (858) 836-0318

Attorneys for Defendants,

PATENAUE & FELIX, A.P.C. and RAYMOND ALCIDE PATENAUE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

PATRICIA CLAIRE BANKSTON,

Plaintiff,

v.

PATENAUE & FELIX, A.P.C. and;
RAYMOND ALCIDE PATENAUE

Defendants.

CASE NO.: C 07-03396 JW

**ANSWER OF PATENAUE &
FELIX, A.P.C. AND RAYMOND
ALCIDE PATENAUE TO
COMPLAINT OF PATRICIA
CLAIRE BANKSTON**

Complaint Filed: June 28, 2007

DEFENDANTS, PATENAUE & FELIX, A.P.C. ("P&F") and RAYMOND ALCIDE PATENAUE ("RAYMOND"), jointly referred to herein as "DEFENDANTS," individually, alone and for no other person, Co-Defendant, firm or corporation, Answer the Complaint of PATRICIA CLAIRE BANKSTON ("PLAINTIFF"), as follows:

INTRODUCTION

1. In answer to Paragraph 1 of PLAINTIFF's Complaint, DEFENDANTS admit that the Fair Debt Collection Practices Act (FDCPA) was passed to prohibit debt collectors from engaging in abusive deceptive and unfair practices. As to the other allegations contained in said Paragraph, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

///

PATENAUE & FELIX, APC
ATTORNEYS AT LAW
4545 MURPHY CANYON ROAD, 3RD FLOOR
SAN DIEGO, CALIFORNIA 92123-4363
TELEPHONE (858) 244-7600 FACSIMILE (858) 836-0320

JURISDICTION

2. In answer to Paragraph 2 of PLAINTIFF's Complaint, DEFENDANTS admit that Jurisdiction is proper.

3. In answer to Paragraph 3 of PLAINTIFF's Complaint, DEFENDANTS deny that they violated the Fair Debt Collection Practices Act. As to the other allegations contained in said Paragraph, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

VENUE

4. In answer to Paragraph 4 of PLAINTIFF's Complaint, DEFENDANTS admit that venue is proper, but deny that they violated the FDCPA. As to the other allegations contained in said Paragraph, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

INTRADISTRICT ASSIGNMENT

5. In answer to Paragraph 5 of PLAINTIFF's Complaint, DEFENDANTS admit that the San Jose Division is the proper District. As to the other allegations contained in said Paragraph, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

PARTIES

6. In answer to Paragraph 6 of PLAINTIFF's Complaint, DEFENDANTS admit that the PLAINTIFF is a natural person, that she lives in Santa Clara county, and that she is a consumer.

///

///

///

///

7. In answer to Paragraph 7 of PLAINTIFF's Complaint, P&F admits that it is a California Professional Corporation (law firm) with its principal place of business at 4545 Murphy Canyon Rd., 3rd Floor; San Diego, CA 92123, and that is also its address for service. P&F further admits that it is a debt collector and it uses the mail, and telephone in the collection of debts owed to others. As to the other allegations contained in said Paragraph, P&F is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

8. In answer to Paragraph 8 of PLAINTIFF's Complaint, RAYMOND admits that he a natural person and is licensed California attorney. RAYMOND further admits that he is a debt collector, and can be served at the address for Patenaude & Felix, A.P.C., as stated in paragraph "7" above. As to the other allegations contained in said Paragraph, RAYMOND is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

9. In answer to Paragraph 9 of PLAINTIFF's Complaint, RAYMOND admits that he is an officer of P&F. As to the other allegations contained in said Paragraph DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

ANSWERS TO FACTUAL ALLEGATIONS

10. In answer to Paragraph 10 of PLAINTIFF's Complaint, DEFENDANTS admit that they are informed and believe that PLAINTIFF incurred a debt on a Capital One credit card bearing the last four (4) digits of 5821. As to the other allegations contained in said Paragraph DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

///

///

///

///

PATENAUE & FELIX, APC
ATTORNEYS AT LAW
4545 MURPHY CANYON ROAD, 3RD FLOOR
SAN DIEGO, CALIFORNIA 92123-4363
TELEPHONE (858) 244-7600 FACSIMILE (858) 836-0320

11. In answer to Paragraph 11 of PLAINTIFF's Complaint, DEFENDANTS admit the alleged debt was placed with P&F for collection. As to the other allegations contained in said Paragraph DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein

12. In answer to Paragraph 12 of PLAINTIFF's Complaint, DEFENDANTS admits that PLAINTIFF's Exhibit "1" was sent to the PLAINTIFF. However, DEFENDANT's deny that the letter they sent consisted of two (2) separate pages. As to the other allegations contained in said Paragraph, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

13. In answer to Paragraph 13 of PLAINTIFF's Complaint, DEFENDANTS admit that PLAINTIFF's Exhibit "1" is dated June 4, 2007.

14. In answer to Paragraph 14 of PLAINTIFF's Complaint, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

15. In answer to Paragraph 15 of PLAINTIFF's Complaint, DEFENDANTS assume that the language of said paragraph is intended say verbatim what is contained in the third (3rd) paragraph of PLAINTIFF's Exhibit "1." As such DEFENDANTS deny each and every allegation contained therein and the whole thereof.

CLAIMS

16. In answer to Paragraph 16 of PLAINTIFF's Complaint, DEFENDANTS admit that the PLAINTIFF is bringing her first claim for relief under the FDCPA.

17. In answer to Paragraph 17 PLAINTIFF's Complaint DEFENDANTS incorporate by reference all of their answers to the above-referenced Paragraphs of PLAINTIFF's Complaint.

18. In answer to Paragraph 18 of PLAINTIFF's Complaint, DEFENDANTS admit that PLAINTIFF is a consumer.

///

PATENAUE & FELIX, APC
ATTORNEYS AT LAW
4545 MURPHY CANYON ROAD, 3RD FLOOR
SAN DIEGO, CALIFORNIA 92123-4363
TELEPHONE (858) 244-7600 FACSIMILE (858) 836-0320

19. In answer to Paragraph 19 of PLAINTIFF's Complaint, P&F admits that it is a debt collector.

20. In answer to Paragraph 20 of PLAINTIFF's Complaint, RAYMOND admits that he is a debt collector.

21. In answer to Paragraph 21 of PLAINTIFF's Complaint, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

22. In answer to Paragraph 22 of PLAINTIFF's Complaint, DEFENDANTS deny that Exhibit "1" violates the FDCPA.

23. In answer to Paragraph 22(a) of PLAINTIFF's Complaint, DEFENDANTS deny each and every allegation contained therein and the whole thereof.

24. In answer to Paragraph 22(b) of PLAINTIFF's Complaint, DEFENDANTS deny each and every allegation contained therein and the whole thereof.

25. In answer to Paragraph 22(c) of PLAINTIFF's Complaint, DEFENDANTS admit that the written notice they sent, which is PLAINTIFF's Exhibit "1" does not specifically state that the PLAINTIFF must notify the DEFENDANTS "in writing." As to the other allegations contained in said Paragraph, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

26. In answer to Paragraph 22(d) of PLAINTIFF's Complaint, DEFENDANTS admit that the written notice they sent, which is PLAINTIFF's Exhibit "1" does not specifically state that the PLAINTIFF must make a "written" request. As to the other allegations contained in said Paragraph, DEFENDANTS are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

27. In answer to Paragraph 23 of PLAINTIFF's Complaint, DEFENDANTS deny each and every allegation contained therein and the whole thereof.

///

28. In answer to Paragraph 24 of PLAINTIFF's Complaint, DEFENDANTS deny each and every allegation contained therein and the whole thereof.

AFFIRMATIVE DEFENSES

On information and belief, DEFENDANTS further allege that the claims that PLAINTIFF has set forth in the Complaint are barred from recovery by one, or more, of the following Affirmative Defenses:

First Affirmative Defense

(FAILURE TO STATE FACTS)

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that the Complaint, and each and every purported Cause of Action therein, fails to state a Cause of Action against DEFENDANTS.

Second Affirmative Defense

(THE DISPUTE DOES NOT HAVE TO BE IN WRITING)

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that pursuant to the 9th Circuit ruling in the case of *Camacho v. Bridgeport Financial, Inc.* 430 F.3d 1078 (9th Cir. 2005) that the initial demand letter does not have to state the dispute as to the validity of the debt or the request for the original creditor must be in writing.

Third Affirmative Defense

(FAILURE TO MITIGATE)

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that as to each alleged Cause of Action, PLAINTIFF, or any other party, has failed, refused and/or neglected to take reasonable steps to mitigate their alleged damages, if any, thus barring or diminishing PLAINTIFF's recovery herein.

///

///

Fourth Affirmative Defense**(UNCLEAN HANDS)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that by virtue of PLAINTIFF's wrongful conduct, PLAINTIFF should be barred from recovery against the DEFENDANTS by the equitable Doctrine of Unclean Hands.

Fifth Affirmative Defense**(UNCERTAIN)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that the Complaint, and each and every Cause of Action stated therein, is and are vague, uncertain, ambiguous, and unintelligible.

Sixth Affirmative Defense**(NOT LIABLE FOR ACTS OF CO-DEFENDANTS)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that it is not legally responsible for the acts and/or omissions of any named, or un-named, Co-DEFENDANTS.

Seventh Affirmative Defense**(INADEQUATE NOTICE)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that the PLAINTIFF has failed to give proper and adequate notice of any alleged claims which are the subject of this action, and to further allow this answering DEFENDANTS sufficient and reasonable opportunity to cure such alleged claims, or make necessary changes, if indeed such changes were needed.

///

///

Eighth Affirmative Defense**(FRIVOLOUS SUIT)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that the Complaint, and each purported Cause of Action contained therein, were brought without a reasonable cause and without a good faith belief that there was a justiciable controversy under the facts and the law to warrant the filing of said Complaint against the answering DEFENDANTS. Therefore, PLAINTIFF is for all necessary and reasonable defense, including costs of suit and attorney's fees incurred by this answering DEFENDANTS, as more particularly set forth in such Sections as 15 USC 1692k(a)(3) and Rule 11.

Ninth Affirmative Defense**(REASONABLE CARE)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that it exercised reasonable care at all times and in all matters relevant to this action. To the extent, if any, that this answering DEFENDANTS are found not to have exercised reasonable care, even if it had exercised reasonable care, it would not have known of any act or omission alleged to give rise to liability in this action.

Tenth Affirmative Defense**(SEVERABILITY)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that, pursuant to California Civil Code Sections 1431.1 through 1431.5, PLAINTIFF is barred and precluded from recovery against this answering DEFENDANTS for any non-economic damages, except those allocated to this answering DEFENDANTS in direct proportion to each DEFENDANTS' respective percentage of fault, if any.

///

///

Eleventh Affirmative Defense**(UNINTENTIONAL)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that any violations, which DEFENDANTS denies occurred, were not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. (15 USC 1692k(c).)

Twelfth Affirmative Defense**(OFF-SET)**

As a separate Affirmative Defense to PLAINTIFF'S complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that the DEFENDANTS have suffered damage by reason of PLAINTIFF's Conduct and DEFENDANTS have the right of set-off of any amount of money allegedly owed to PLAINTIFF due by way of the Complaint.

Thirteenth Affirmative Defense**(PRIVILEGE/JUSTIFICATION)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that any actionable conduct by the DEFENDANTS, which DEFENDANTS deny occurred, was Privileged and/or justified.

Fourteenth Affirmative Defense**(FIRST AMENDMENT)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that DEFENDANTS' alleged conduct and communications in attempting to collect a debt constitutes valid commercial speech, and is part and parcel of DEFENDANTS' right to petition, and is therefore entitled to protection under the First Amendment of the Constitution of the United States.

1 PLAINTIFF's proposed interpretation of the provisions of the Fair Debt Collection
 2 Practices Act (FDCPA) must be rejected as they would place an unreasonable restraint upon
 3 valid commercial speech and upon DEFENDANTS' right to petition, thereby raising serious
 4 constitutional issues.

5 **Fifteenth Affirmative Defense**

6 **(NO MALICE FRAUD OR OPPRESSION)**

7 As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action
 8 contained therein, these answering DEFENDANTS are informed and believe and thereon
 9 affirmatively allege that any acts, statements or communications made by DEFENDANTS
 10 concerning PLAINTIFF were made without malice, fraud or oppression.

11 **Sixteenth Affirmative Defense**

12 **(EQUITABLE INDEMNITY)**

13 As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action
 14 contained therein, these answering DEFENDANTS are informed and believe and thereon
 15 affirmatively allege that to the extent that PLAINTIFF has suffered any damage as a result of any
 16 alleged act or omission of DEFENDANTS, which DEFENDANTS denies, DEFENDANTS are
 17 entitled to equitable indemnity according to comparative fault from other persons and/or entities
 18 causing or contributing to such damages, if any.

19 **Seventeenth Affirmative Defense**

20 **(GOOD FAITH)**

21 As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action
 22 contained therein, these answering DEFENDANTS are informed and believe and thereon
 23 affirmatively allege that DEFENDANTS have, at all material times with respect to PLAINTIFF,
 24 acted in good faith in an effort to comply fully with all relevant federal and state laws.

25 ///

26 ///

27 ///

28 ///

Eighteenth Affirmative Defense**(NO WILLFUL CONDUCT)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that DEFENDANTS acted in good faith at all times in its dealings with PLAINTIFF, and if any conduct by DEFENDANTS are found to be unlawful, which DEFENDANTS expressly deny, such conduct was not willful and should not give rise to liability.

Nineteenth Affirmative Defense**(UNKNOWN AFFIRMATIVE DEFENSES)**

As a separate Affirmative Defense to PLAINTIFF's Complaint, and all Causes of Action contained therein, these answering DEFENDANTS are informed and believe and thereon affirmatively allege that presently they have insufficient knowledge or information to form a belief as to whether they have additional, and as yet unstated, Affirmative Defenses available to them.

These answering DEFENDANTS, therefore, reserve the right to request leave of the Court to assert additional Affirmative Defenses in the event Discovery or investigation indicates such would be appropriate.

///

///

///

///

///

///

///

///

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WHEREFORE, DEFENDANTS pray for Judgment against the PLAINTIFF as follows:

1. That PLAINTIFF take nothing by reason of the Complaint, and that Judgment be entered in favor of DEFENDANTS; and
2. That DEFENDANTS be awarded its costs of suit incurred in defense of this action; and
3. That DEFENDANTS be awarded its attorney's fees incurred in defense of this action; and
4. For such other relief as the Court deems just and proper.

///

Respectfully submitted:

PATENAUE & FELIX, A.P.C.

Dated: July 25, 2007

By:

MATTHEW B. GOLDING, ESQ.
Attorneys for Defendants,
PATENAUE & FELIX, A.P.C. and
RAYMOND A. PATENAUE

PATENAUE & FELIX, APC
ATTORNEYS AT LAW
4545 MURPHY CANYON ROAD, 3RD FLOOR
SAN DIEGO, CALIFORNIA 92123-4363
TELEPHONE (858) 244-7600 FACSIMILE (858) 836-0320

PATENAUE & FELIX, APC

Raymond A. Patenaude, Esq. (#128855)
Victor S. Patenaude, Esq. (#216342)
Matthew B. Golding, Esq. (#171123)
Michael R. Boulanger, Esq. (#226294)
Daniel L. Vinson, Esq., (#214005)
4545 Murphy Canyon Road, 3rd Floor
San Diego, California 92123-4363
(858) 244-7600 Fax (858) 836-0318

Attorneys for Defendants,
PATENAUE & FELIX, A.P.C. and RAYMOND ALCIDE PATENAUE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

PATRICIA CLAIRE BANKSTON,

Plaintiff,

v.

PATENAUE & FELIX, A.P.C. and;
RAYMOND ALCIDE PATENAUE, et al,
and Does 1 through 15,

Defendant(s).

Case No.: C 07-03396 JW

PROOF OF SERVICE

DECLARATION OF SERVICE

I, Gloria E. Hernandez, declare:

I am a citizen of the United States and I am employed in the County of San Diego, State of California; I am over the age of 18 years and not a party to this action; my business address is 4545 Murphy Canyon Road, 3rd Floor, San Diego, California 92123.

I further declare that I am readily familiar with the business practice of Patenaude & Felix, APC for service of documents, that documents served by facsimile are transmitted in and the original deposited with the United States Postal Service in our ordinary course of business on the same day, the documents served by mail are deposited with the United States Postal Service in the ordinary course of business the same day and that documents served personally are delivered the same day.

///

on July 25, 2007, I served the following document(s):

- 1.) ANSWER OF PATENAUDE & FELIX, A.P.C. AND RAYMOND ALCIDE PATENAUDE TO COMPLAINT OF PATRICIA CLAIRE BANKSTON

FRED W. SCHWINN, ESQ.
12 SOUTH FIRST STREET, STE. 416
SAN JOSE, CA 95113

in the following manner of service (check appropriate):

XXX **BY U.S. MAIL:** I placed a true copy in a sealed envelope addressed as indicated above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on a motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one date after date of deposit for mailing in affidavit.

 BY FACSIMILE: I transmitted all documents to all parties in this action by facsimile at the telephone number(s) indicated above and thereafter placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at the Law Offices of PATENAUDE & FELIX APC, San Diego, California.

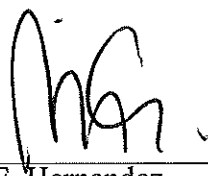
 BY DHL EXPRESS OR FEDEX: I caused such documents to be delivered by DHL Express or Fedex to the offices of the addressee(s).

 BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee(s) above.

XXX (State) I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

 (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 25, 2007, at San Diego, California.



Gloria E. Hernandez

PATENAUDE & FELIX, APC
ATTORNEYS AT LAW
4545 MURPHY CANYON ROAD
SAN DIEGO, CALIFORNIA 92123-4363
TELEPHONE (619) 244-7600 - FACSIMILE (619) 836-0318